

EXHIBIT 3

18c3natMS

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 NATIONAL ASSOCIATION FOR THE
5 ADVANCEMENT OF COLORED PEOPLE,
6 SPRING VALLEY BRANCH, et al.,

7 Plaintiffs,

8 v.

17 Civ. 8943 (CS) (JCM)
Status conference

9 EAST RAMAPO CENTRAL SCHOOL
10 DISTRICT, et al.,

11 Defendants.
12 -----x

White Plains, New York
December 3, 2018

13 Before:

14 THE HONORABLE JUDITH C. MCCARTHY,

Magistrate Judge

15 APPEARANCES

16 LATHAM & WATKINS
17 Attorneys for Plaintiffs
18 RUSSELL D. MANGAS
MICHAEL FARIS
ELIZABETH A. PARVIS

19 ADVOCATES FOR JUSTICE, CHARTERED ATTORNEYS
20 Attorneys for Emilia White and Steven White
LAURA D. BARBIERI

21 MORGAN, LEWIS & BOCKIUS LLP
22 Attorneys for Defendant
23 DAVID J. BUTLER
RANDALL M. LEVINE

24
25 Digital recording.

APPEARANCES; (Continued)

Also Present:

TROUTMAN SANDERS LLP
Attorneys for Community Connections
AVI SCHICK

- - -

THE DEPUTY CLERK: In the matter of the NAACP versus
East Ramapo Central School District.

Counsel, please state your appearances for the record.

MR. MANGAS: Russell Mangas, Latham & Watkins, on
behalf of the plaintiffs.

MR. FARIS: Michael Faris, on behalf of plaintiff.

MS. PARVIS: Good morning, your Honor.

Elizabeth Parvis for the plaintiffs.

THE COURT: I'm just going to -- because of this
wonderful sound that we're having, I'm going to ask everybody
to really speak up, because I think we're going to have a hard
time getting this on the microphone. In fact, if could pull
the microphones forward.

So I'm going to ask you to say your name again.

MS. PARVIS: Certainly.

Elizabeth Parvis, also with Latham & Watkins, for
plaintiffs.

THE COURT: Okay. And then --

MR. FARIS: Michael Faris.

THE COURT: Thank you.

1 MR. BUTLER: Good morning, your Honor.

2 David Butler on behalf of the defendant.

3 THE COURT: Good morning.

4 MR. LEVINE: Good morning, your Honor.

5 Randall Levine for the defendant.

6 THE COURT: I also understand --

7 Hi, Ms. Barbieri.

8 We've got Ms. Barbieri here in the courtroom.

9 And, Mr. Schick, are you here?

10 MR. SCHICK: Yes, your Honor.

11 THE COURT: Okay. Great.

12 At some point when we get to the motions that deal
13 with your client, I'll ask you to come up to the podium so you
14 can be heard also. Okay?

15 MR. SCHICK: Thank you.

16 THE COURT: So everybody can be seated. And as you
17 know, just stand when addressing the Court.

18 So I have several outstanding motions made by all
19 parties. I'm going to go through -- I believe I've got them
20 categorized in five. I'm just going to summarize that when we
21 start, and then I'm going to address each one individually.

22 So I have plaintiffs' motion to quash the subpoenas
23 served on Steve White and Catalist. That is Docket Number 206.

24 There's plaintiffs' letter, District's response to
25 Steve White's subpoenas, Docket Number 210.

1 District's response to Catalist subpoenas, Docket
2 Number 215.

3 Mr. White's response to the District is Docket
4 Number 217.

5 Plaintiffs' response to Docket Number 215 is Docket
6 227.

7 I also have the District motion to quash subpoenas to
8 Mr. Butler, Docket Number 208, Docket Number 219 and Docket
9 Number 223.

10 I have the District's motion to compel nonparty JAMCAR
11 to comply with a subpoena. JAMCCAR is J-A-M-C-C-A-R. That's
12 Docket Number 213. I did not see a response filed to that.

13 Then I have the District motion for Ms. White to show
14 cause why she failed to appear at a deposition, Docket
15 Number 214, and Docket Number 217.

16 And plaintiffs' motion to compel nonparty Community
17 Connections, which is Docket Number 226, 237 and 238.

18 Okay. We're going to deal with these all in whatever
19 random order I deem worthy.

20 We're going to start with what I hope is going to be
21 easiest, the District motion to compel nonparty JAMCCAR to
22 comply with the subpoena.

23 Mr. Butler or Mr. Levine, I don't see any response to
24 that. have you seen any response to that? Have you heard
25 anything?

1 MR. BUTLER: No, your Honor.

2 And when your order was issued, you directed us to get
3 in touch with JAMCCAR. We sent them the copy of the order by
4 FedEx and by regular U.S. Mail. We haven't heard a word from
5 them. And you've got it all in our letter as to what other
6 efforts we undertook. They've ignored us.

7 THE COURT: Okay. Plaintiffs, have you heard from
8 them?

9 MR. MANGAS: Your Honor, we have not heard from them.
10 We don't represent JAMCCAR.

11 THE COURT: No, I know you don't. I just thought in
12 case they reached out to someone else before I ruled on this, I
13 wanted to make sure they hadn't reached out to you for some
14 reason in this case.

15 MR. MANGAS: They have not.

16 We did a little bit of research on our own, and
17 recognized that the address that's publicly listed on the
18 JAMCCAR Web site is a different address than where defendants
19 served them and sent the letter. So it's not clear to us that
20 JAMCCAR is even aware that they've been served a subpoena.

21 THE COURT: Okay. Mr. Butler.

22 MR. BUTLER: That's the address that they listed with
23 the Secretary of State, as we showed in our papers. That is
24 the address where someone signed and acknowledged receipt, and
25 as we've shown you in our papers. So, you know, what are we

1 supposed to do?

2 THE COURT: I'm granting this motion to compel as
3 unopposed.

4 So we can do it a couple of ways. You can send me in
5 a subpoena that I can so order to be served upon them, or just
6 a proposed order attached to their prior subpoena. I'm going
7 to defer to you, Mr. Butler, on what's the best way to do it.
8 And whether you want to issue a new subpoena with my signature
9 on it, or you just want to put in an order that I attach to the
10 prior subpoena proposed order to me, we'll do it that way.
11 Okay?

12 MR. BUTLER: Thank you, your Honor.

13 THE COURT: Okay. So the second one I want to deal
14 with is the District's motion to quash the subpoena to
15 Mr. Butler. This is docket Number 208, District's letter,
16 Docket Number 219 and Docket Number 223.

17 I'm going to ask the District to very briefly --
18 because I have read everything on this, and we do have a lot to
19 deal with today -- very briefly to summarize why you want the
20 Court to quash the subpoena. And then I'll allow plaintiffs to
21 briefly respond. And then I'll rule.

22 MR. LEVINE: Thank you, your Honor.

23 As you have said, it is all laid out in the letters
24 that we filed with the Court. The long and short of it is that
25 to depose opposing counsel, opposing litigation counsel, in the

1 case is extremely disfavored. The plaintiffs would have to
2 make a serious showing as to why they absolutely need to do
3 that, why opposing counsel, Mr. Butler, would have information
4 that they can't get anywhere else. And that would be
5 information that he would have in some way outside of his role
6 as litigation counsel for the District in this case.

7 They haven't shown that they have any such need. The
8 only thing that they have shown is one text message out of
9 17,000 pages of text -- or 1700 pages of text messages in which
10 Mr. Butler is purportedly giving some advice to his client
11 about what to do for this case, which necessarily means that
12 it's in his role as litigation counsel.

13 There is no evidence that they've pointed to
14 whatsoever that Mr. Butler has any role outside of his role as
15 litigation counsel. And there is no reason whatsoever to
16 impose a burden on the District to require him to appear for
17 deposition or produce documents that are all going to be
18 privileged or attorney work product.

19 THE COURT: So just that it's very clear, that one
20 text message is not from Mr. Butler.

21 MR. LEVINE: Correct.

22 THE COURT: It's from another individual who is
23 relaying what he believes is a message from -- or advice,
24 rather than a message, an advice from Mr. Butler.

25 MR. LEVINE: Correct.

1 That individual is Perry Grossman, the president of
2 the school board. And he was relaying a message to another
3 third party as he sat in his desk.

4 THE COURT: Okay. Thank you.

5 Who's going to be heard on this?

6 MR. MANGAS: Russell Mangas, your Honor.

7 THE COURT: Thank you, Mr. Mangas.

8 And, also, Mr. Mangas, before you proceed, I realize
9 because this is on a court reporter, I should have said -- this
10 is on a court transcript, and a reporter at some point is going
11 to probably have to transcribe this, please identify who's
12 speaking first for the ease of the reporter.

13 Thank you.

14 You can proceed, Mr. Mangas.

15 MR. MANGAS: Your Honor, there is a couple of things
16 that we all agree on here.

17 The first is that there's evidence that Mr. Butler,
18 the attorney for the District, asked the president of the
19 school board, Perry Grossman, to convey to an influential
20 member of the Jewish community, Hersh Horowitz, that it would
21 be good if the community replaced --

22 THE COURT: I don't think we can all agree on that. I
23 think we can all agree that there is a text message from
24 Mr. Grossman relaying a message that he believes he was given.
25 We don't -- we can't say that that message was given. Do you

18c3natMS

1 have -- what proof do you have, other than the person saying
2 that? You don't have Mr. Butler, and this is his client.
3 Isn't this privileged information?

4 MR. MANGAS: There's no indication that's been
5 provided that Mr. Grossman made that up. We have that piece of
6 evidence, and that's all we've heard, is the piece of evidence
7 from Mr. Grossman says --

8 THE COURT: From an attorney, information he got from
9 an attorney, his attorney.

10 MR. MANGAS: That his attorney asked him to convey to
11 Mr. Horowitz --

12 THE COURT: Yes. Okay. Keep going.

13 MR. MANGAS: -- that it would be good if the community
14 placed Sabrina Charles Pierre with a minority candidate who the
15 Jewish community could support.

16 The other thing that we'd certainly agree on, because
17 the District said it in their letter, is that that
18 communication was not privileged.

19 There is some other facts that are --

20 THE COURT: No. That's not what the District said.
21 Be very careful here. The District said that they produced
22 that because that communication was relayed to another
23 individual, that that communication between Mr. Grossman and
24 that third party was not privileged because it was conveyed.
25 They never said that the communication between Mr. Butler and

1 Mr. Grossman was not privileged. That was not said. They have
2 not even said that that privilege was waived. They simply said
3 they produced that because they could not claim a privilege
4 when that information was shared to another.

5 MR. MANGAS: And, your Honor, that's what I was
6 referring to, is the communication that's been produced in this
7 case. All sides have agreed that is not a privileged
8 communication, the communication from Mr. Grossman to
9 Mr. Horowitz relaying what Mr. Grossman states is Mr. Butler's
10 advice.

11 THE COURT: And I have ruled that you can take their
12 depositions, and therefore find out more about that
13 communication between them, those two individuals. So why do
14 you need Mr. Butler's.

15 MR. MANGAS: Well, your Honor --

16 THE COURT: Why are you turning this -- I'm not happy
17 with this motion, as you can see. I just -- I read this, and I
18 was shocked. Shocked. I expect a lot more from Latham &
19 Watkins than going kind of in this -- you know, taking an
20 attorney who's been working on this case and trying to turn
21 them into a fact witness and trying to say that you should be
22 allowed to take their deposition because one of their clients
23 relayed a message that they allegedly said to another person.
24 That doesn't make an attorney into a fact witness.

25 You give your client all the time advice, all the

1 time. If that person goes and tells someone else that piece of
2 advice, does that make you a fact witness? Does that make you
3 now part of this case? Does that allow the other attorney to
4 come in and ask you questions under oath? Should that happen?
5 Should they be allowed, if one of your witnesses, one of your
6 experts, one of your consultants that you've hired goes and
7 says something, should they then turn in and say, "Okay.
8 You've advised them to do something a certain way," and they
9 should be allowed to put you under oath and take questions?

10 MR. MANGAS: If I'm providing nonlegal advice that I'm
11 asking be conveyed to a third party who is not a client, then
12 yes.

13 And, your Honor, we agree this isn't a typical
14 situation. And then, as your Honor described it: Shocking.
15 But it's not our actions that have led to this. Whether -- the
16 fact that Mr. Butler --

17 THE COURT: I think you're making too much of a simple
18 statement you read. And I think you're trying to breach an
19 attorney-client privilege based on that in an inappropriate
20 way. And I think part of it is the fact that -- on both
21 sides -- there is a scorched earth mentality in this case. And
22 so you will go until there is no earth left.

23 I don't believe that a third -- a statement that is
24 from someone that may or may not be an accurate reflection of
25 what Mr. Butler said is going to allow you to open the door and

1 ask Mr. Butler questions. I don't think there is any evidence
2 that supports your arguments that Mr. Butler is involved in the
3 slating process. I think he's involved in being a zealous
4 advocate on behalf of his client and providing advice to his
5 client under the attorney-client privilege.

6 And I am denying this. I'm not -- we have so much to
7 do, I'm not going to hear further argument on this. I don't
8 think the evidence that you have submitted before me supports
9 your arguments at all. And I am granting District's motion to
10 quash the subpoena, and I'm not allowing you to depose
11 Mr. Butler on this issue.

12 MR. MANGAS: Can I be heard briefly for the record,
13 your Honor?

14 THE COURT: Yes.

15 MR. MANGAS: I'll keep it short.

16 In terms of the relevance of this communication, it is
17 almost impossible to imagine that it would not be highly
18 probative for the finder of act in this case, Judge Seibel, to
19 know that one of the District's own agents -- in this case,
20 Mr. Butler -- suggested advice to be conveyed to an influential
21 member of a slating organization in a like community that they
22 should replace a minority-preferred board member with a safe
23 high-preferred candidate. That goes to, one, whether there's
24 an exclusionary mechanism in the District operating in East
25 Ramapo, and two, the District itself discouragement of

1 responsiveness to the minority community.

2 And briefly, your Honor, in terms of the privilege
3 issue that's obviously at the heart of that, the District isn't
4 saved by the fact that it was Mr. Butler giving the
5 communication or -- in the first instance, or that he appended
6 the magic words that it would be good for the case in his
7 advice to replace Ms. Pierre Charles.

8 Of course, it would be good for the District's case if
9 they could continue arguing to Judge Seibel, "Look. There are
10 minority candidates on the school board," while obscuring the
11 reality that there is a lot of work behind the scenes to make
12 sure that the only candidates that can make it to the school
13 board are safe candidates acceptable to the white community.

14 And the fact that it may be good for the case doesn't
15 make that legal advice. An attorney defending a "price fixing"
16 claim could tell his or her client it would be good for the
17 case to convey to competitors that one should raise their price
18 and one should lower it. But that wouldn't convert it into
19 legal advice.

20 And likewise, here, we've cited -- I won't rehash. I
21 know your Honor doesn't want much argument on the topic, but we
22 cited the Chevron case that says when you're providing
23 political advice or other advice that's nonlegal, regardless of
24 whether --

25 THE COURT: I just don't think you factually have made

18c3natMS

1 it here at all. You have not met the standards in the Chevron
2 case in this case at all. You've taken a statement by an
3 individual about another person and about advice. The facts
4 are not here to support it. You are going to be allowed to
5 depose these individuals. At least I have ruled that you can
6 depose these individuals. I believe Judge Seibel has affirmed
7 my ruling that you can depose these individuals. Whether
8 that's appealed and changed by the Circuit, you know, that's
9 not here. But in my opinion, you know, to take the deposition
10 of an attorney who's been an attorney on this case from its
11 inception, when you have other means in which you can get
12 information regarding the slating process, regarding, you know,
13 the minority candidates put up, regarding why they put up
14 certain candidates and why they supported others, I don't think
15 you have met what I believe is a higher burden that needs to be
16 met that's sets forth in the case law to take the deposition of
17 an attorney on the case.

18 So we're going to move on to the next issue.

19 MR. MANGAS: Thank you, your Honor.

20 THE COURT: The next issue is plaintiffs' motion to
21 compel nonparty Community Connections, which is Docket
22 Numbers 226, 237 and 238.

23 Mr. Schick, you're going to have an opportunity to
24 respond to this. I'm going to ask -- I don't know who for the
25 plaintiffs' side is to go to be heard on this, but I'm going to

1 ask plaintiffs to tell me a little bit more about why they want
2 to get these records. And I specifically want to understand
3 everything you've gotten so far, the nature of this
4 publication, because it's not completely clear to me from
5 reading it -- I have a sense of what it might be -- and what it
6 is that's remaining and why you need it.

7 MR. MANGAS: Certainly, your Honor. And if it's
8 helpful, we've gotten -- we've handed copies to Mr. Schick and
9 the District's attorneys the most recent publication of the
10 community group.

11 THE COURT: Thank you.

12 (Pause)

13 MR. MANGAS: And essentially, to your question --

14 THE COURT: And just for the record, this is
15 Mr. Mangas.

16 MR. MANGAS: I'm sorry. Russell Mangas on behalf of
17 the plaintiff.

18 Thank you, your Honor.

19 To answer your Honor's question, the Community
20 Connections is essentially an advertising circular on -- as far
21 as we can tell from reviewing episodes, there's no editorial
22 comment, there's no reporting. It's a several hundred page
23 circular of advertisements.

24 THE COURT: Is this -- because you've handed me a
25 document. Is this one, or is this like, you know -- how would

1 this come in? Would this come in this thick? Is this multiple
2 ones? Does this come in as individual pages?

3 MR. MANGAS: Your Honor, our understanding is that
4 that is a circular that's circulated on hard copy throughout
5 the Monsey community, I think to 12,000 or so Orthodox families
6 in the community.

7 The version that you're looking at is the PDF version
8 of that to make available for download on the Community
9 Connections Web site.

10 THE COURT: Okay.

11 MR. MANGAS: I'm happy to have Mr. Schick pose today
12 if there is more -- if there are more facts to be had, but
13 that's our understanding.

14 In terms of your Honor's first question, what has been
15 produced, one of the things that we asked for were political
16 advertisements placed on behalf of candidates for the District
17 School Board, and Community Connections has produced 28 such
18 advertisements which represents the advertisements in its
19 possession, custody or control responsive to that request since
20 2010.

21 The information that we are continuing to seek is
22 two-fold. Number one is information sufficient to identify the
23 individuals who placed and paid for those 28 advertisements;
24 and number two, information as to whether Community Connections
25 has rejected requests for advertisements relating to a

1 candidate running for the school board.

2 A bit of nuance to that second request, we had
3 initially asked for documents or information related to any
4 advertisements that have been rejected for school board
5 candidates. Through the meet-and-confer process, we were told
6 that it would be very onerous to review all of the advertising
7 requests and records. We agreed that we would be satisfied if
8 Community Connections went to whatever individuals had the
9 knowledge of advertisements, entities seeking to place
10 advertisements, and they could talk to those individuals and
11 tell us, in the first instance, whether or not Community
12 Connections has, indeed, rejected any advertisements.

13 So those are the two things that we currently seek
14 today.

15 Community Connections -- the information we seek is
16 relevant, because, as I said, Community Connections is a weekly
17 circular. But it has included advertisements for school board
18 candidates. It goes to, I would believe, 12,000 families in
19 the Monsey area targeted towards the Orthodox community, which,
20 as your Honor is aware, are almost exclusively white
21 individuals.

22 We recently deposed Kalman Weber, a member of that
23 community, who runs an organization and is the sole member of
24 an organization called the Southeast Ramapo Taxpayers'
25 Association, or SERTA. Mr. Weber's had involvement in several

18c3natMS

1 board elections supporting candidates through financial
2 contributions or placing advertisements on their behalf,
3 providing them with SERTA endorsement. And Mr. Weber testified
4 at his deposition that one of the ways that he sought to bring
5 out the vote for school board elections was to place
6 advertisements in the Community Connections magazine.

7 Notwithstanding that, we showed Mr. Weber somewhere in
8 the neighborhood of 15 or so advertisements that bore either
9 his name or the name of the Southeast Ramapo Taxpayers'
10 Association endorsement, and he disclaimed that those were
11 actually his advertisements, and testified that there must be
12 others in the community that are placing advertisements for
13 school board candidates and using his name.

14 So it's not as simple --

15 THE COURT: And using his name?

16 MR. MANGAS: Using his name or using the name of his
17 organization. He testified to both instances.

18 THE COURT: Okay. So he testified that he has placed
19 ads in this circular.

20 MR. MANGAS: That's correct.

21 THE COURT: But that the ones you showed him were not
22 ads that he had placed. They were ones placed using his name
23 or his organization's name, but they were replaced by him.

24 MR. MANGAS: That's correct, with one refinement on
25 that, which is not all the advertisements we showed him were

18c3natMS

1 Community Connections advertisements. We had a whole series of
2 campaign advertisements and endorsements and --

3 THE COURT: But some that were in Community
4 Connections that has his name or his organization's name were
5 not placed by him.

6 MR. MANGAS: According to him.

7 THE COURT: Yes. You would think he might know.

8 MR. MANGAS: We would hope so.

9 And so that's why a lot of these advertisements, 28
10 advertisements that have been produced, many of them, indeed,
11 say Southeast Ramapo Taxpayers' Association, or have Kalman
12 Weber's name. But as he himself has testified, that doesn't
13 mean that he funded or placed all those advertisements.

14 And so that's the information that we are still
15 seeking. The bases of relevance is -- and I'll quote from
16 Community Connections letter to the Court, which I believe is
17 Docket --

18 237?

19 -- Docket 237. It's relevant to the slating process.
20 They quote a case, Community Connections has in its letter, at
21 Docket 237, where they say, "The candidate slating inquiry
22 focuses on whether there is a process in which some influential
23 nongovernment organization selects and endorses a group or
24 slate of candidates, rendering the election little more than a
25 stamp of approval for the candidate's selection."

18c3natMS

1 We have no quibble with that case cite, and that's
2 exactly what we're seeking here.

3 THE COURT: Can you -- I have the document in front of
4 me. Can you direct me to the right page?

5 MR. MANGAS: I believe it's on Page 2 of Docket 237.
6 The case is Pope versus City of Albany.

7 THE COURT: Okay. Thank you.

8 MR. MANGAS: And so our position, your Honor, is that
9 we're entitled to that information and to understand who was
10 involved in the slating organization and how it works. And if
11 there are influential members of the white Orthodox communities
12 who are financing campaigns or making endorsements or placing
13 campaign advertisements that for the last several years have
14 helped ensure that the white preferred candidates have been
15 elected, plaintiffs are entitled to that information.

16 Likewise, if Community Connections is lending its
17 support to the slating organization by advertising for white
18 preferred candidates, but refusing to place advertisements or
19 allow circulation of advertisements in their magazines to the
20 12,000 or so families in the Monsey community, that is highly
21 probative information as to not only the existence of a slating
22 organization, but the effectiveness.

23 THE COURT: Can't a paper refuse to run certain ads?
24 Don't they have that prerogative?

25 MR. MANGAS: Your Honor, we're not arguing that

1 they're required to run the ads, only that it's probative if
2 they're running ads exclusively for white preferred candidates
3 and refusing to run ads for minority preferred candidates. But
4 as far as I know, your Honor, no, they are not required to run
5 a particular advertisement.

6 THE COURT: Is there -- because -- and then I'm going
7 to let Mr. Schick respond to some of these questions that I'm
8 asking.

9 Is there -- I think you might have answered this at
10 the beginning, but remind me. There was a burdensome argument
11 being made by Mr. Schick.

12 How have you dealt with that on the issue of any
13 rejection of ads?

14 MR. MANGAS: So -- right. There are two burden
15 arguments that Mr. Schick makes, one that it would be too
16 burdensome to tell us who paid for the 28 advertisements they
17 did produce, and then second, that it would be too burdensome
18 to tell us whether or not they rejected ads for other
19 candidates for school board.

20 Initially, we requested documents related to the
21 rejection of any advertisement for campaign for school board.
22 We were told that that was too burdensome. And so we agreed
23 that we would be satisfied with an interim step, which is to
24 talk to whoever it is at Community Connections that's
25 responsible for receiving advertisement requests, and would be

1 knowledgeable about those types of requests and the documents,
2 and to interview that person and ask them, "Do you -- have you
3 rejected in the past any advertising requests?" and if the
4 answer is "No," represent that to us in writing, and that will
5 end the issue. And they've continued to maintain that that's
6 too burdensome to engage in.

7 THE COURT: Okay.

8 MR. MANGAS: The only other point I wanted to make,
9 your Honor, if your Honor is so inclined, is the First
10 Amendment arguments that have been made with respect to the
11 journalistic privilege. That does -- the journalistic
12 privilege does not apply to Community Connections here for two
13 reasons.

14 Number one, it's not a newspaper. It's a weekly
15 savings guide. We cite a case, Bulow versus -- Von Bulow by
16 Auersberg versus Von Bulow, a Southern District of New York
17 case, in our paper for the proposition that the journalistic
18 privilege only applies to a professional journalistic effort in
19 news reporting; and second, and very related, the
20 advertisements themselves, even if Community Connections were a
21 journalistic enterprise, which it's not, even if it were, the
22 advertisements themselves are not reporting. And
23 advertisements are not protected by any journalistic privilege
24 that requires -- I mean we're, all familiar with the archetype
25 of protecting your sources in reporting, and the reasons for

1 why you wouldn't compel a journalist to disclose sources and
2 means and methods, et cetera, because it could put a real chill
3 on that type of reporting. That concern doesn't exist here.
4 We've cited the case, Chevron versus Berlinger in our papers
5 for that proposition.

6 And, indeed, your Honor, the type of disclosures that
7 we're asking for, who paid for political advertisements, are
8 the type of information that's commonly compelled in the
9 "campaign finance" context. And we cite Citizens United for
10 that proposition.

11 Unless your Honor has further questions, I'll cede the
12 mike.

13 THE COURT: Do you want to address the other First
14 Amendment issue they have which sounds like a --

15 MR. MANGAS: Right. So they make a --

16 THE COURT: That makes the chilling and freedom of
17 association type --

18 MR. MANGAS: A "right to association" argument, yes.
19 Right.

20 And they claim -- both Community Connections and the
21 defendants claim in their letters that are subpoenas, quote,
22 targeting people because of their associations with political
23 advocacy organizations, and that we're asking for compelled
24 disclosure of affiliation with groups engaged in advocacy.
25 Community Connections letter goes on, on Page 4, Footnote 3, to

1 claim that if they were somehow required to disclose who paid
2 for these advertisements, that any entity that publishes
3 endorsement of a political candidate could be required to
4 disclose its donor and volunteer lists, enforced to divulge who
5 it met and consulted with in deciding to make an endorsement.

6 Your Honor, that's not correct. We're not asking for
7 that information. We're asking very simply to identify who
8 paid for 28 political advertisements that Community Connections
9 has already produced. And those political advertisements are
10 for candidates who exclusively have been the white preferred
11 candidate of choice under our racially polarized voting
12 analysis, and who have won.

13 It's highly relevant information. They don't cite a
14 single case that says you can't be required to disclose who
15 paid for a political advertisement.

16 THE COURT: Okay. Thank you very much, Mr. Mangas.

17 Okay. Mr. Schick, I'll let you speak.

18 MR. SCHICK: Thank you, your Honor.

19 Good morning.

20 Avi Schick on behalf of nonparty Community
21 Connections.

22 I want to start by just briefly responding to several
23 things that Mr. Mangas said, but even before that, to just talk
24 about the reason we're here today on the subpoena that we
25 received in August is because the subpoena itself was wildly

18c3natMS

1 overbroad. It was not at all focused on the school board
2 elections. In fact, your Honor, it sought every political ad
3 regarding every election going back well over a decade. And
4 unfortunately, it took us weeks and months of back-and-forth
5 and expense to get plaintiffs to finally agree that their
6 subpoena in this case should be limited to the school board
7 elections that is the focus of this case. And we reached out
8 to them in August when we got the subpoena. We spoke with them
9 in a meet-and-confer September 7th about that issue. I think
10 none of the lawyers who have ever spoken with me bothered to
11 should show up today. But that's the reality here. So we had
12 weeks and weeks of e-mails, phone conferences, and
13 correspondence just to understand that -- to get them to
14 understand and to get them to explain to us why this case --
15 why this subpoena would involve anything beyond the school
16 board elections.

17 So when they finally agreed to limit it to the school
18 board elections, we promptly, as they acknowledge, produced all
19 the ads going back to 2010 -- they also agreed to a time
20 limitation -- regarding the school board election. But, of
21 course, as everybody has acknowledged this morning, this is a
22 "scorched earth" case. And so the question is: If they get to
23 go beyond the advertisements and they get -- and again, their
24 subpoena is not limited to who paid for it, but it's broader
25 than that. If they get to go beyond the advertisements, your

1 Honor, to the question of who had any involvement with respect
2 to the placing of the payment of the ad, there's no -- that may
3 end Community Connections' involvement with this, but there's
4 no doubt they'll be back in front of you, your Honor, "We want
5 to subpoena that person. We want to depose that person."

6 THE COURT: Well, you know they already have
7 subpoenaed or are trying to depose that person.

8 MR. SCHICK: It may be. But there's a "scorched
9 earth" approach here, your Honor, which puts a chill on any
10 interaction with any entity, even a newspaper, that, you know,
11 somehow touches on this election.

12 And I want to address: Is Community Connections a
13 newspaper? It surely is. Do they run editorials? They surely
14 occasionally do. The fact -- I don't know on what basis
15 Mr. Mangas said to this Court in his first words that they
16 deliver it to Orthodox Jewish homes. I don't believe there's
17 any truth to that assertion. I am sure that the distribution
18 is geographically limited. But the idea that they pick out
19 Orthodox Jewish homes, which what plaintiffs' attorney just
20 told this Court, is almost surely false.

21 THE COURT: Are you telling -- are you telling me that
22 this is going to more than Orthodox Jewish communities?

23 MR. SCHICK: I believe its distribution is geographic,
24 so within geographic bounds, your Honor -

25 THE COURT: Mr. Schick --

18c3natMS

1 MR. SCHICK: -- within geographic bounds --

2 THE COURT: Mr. Schick, you're not answering my
3 question.

4 One can, in certain communities, if one is
5 geographically limiting where something is sent, one can be
6 sending it to only the Jewish communities. And so my question
7 to you -- and it may be geographically bound, but is it only
8 sent to the Jewish communities?

9 MR. SCHICK: I believe the question is: Is it only
10 sent to Orthodox Jewish homes? The answer would probably be
11 no.

12 THE COURT: Do you believe -- has your client told you
13 that this publication is --

14 What is the target audience of this publication?

15 MR. SCHICK: It's people who live within a certain
16 geographic area who presumably would then shop at stores that
17 service that geographic area, which would help solicit
18 advertisements from businesses that want to obtain customers
19 within that area.

20 But, your Honor --

21 THE COURT: Half of this publication is -- I'm not
22 sure. Is it considered Hebrew, or Yiddish?

23 MR. SCHICK: Well, the letters used -- the letters are
24 the same. The alphabet used is the same, your Honor.

25 THE COURT: Okay. The pictures are all showing

18c3natMS

1 Orthodox Jewish community.

2 MR. SCHICK: Your Honor, I'm not disputing that the
3 overwhelming majority of people within that geographic area are
4 going to be members of that community. I'm just pointing out
5 that Mr. Mangas said straight out they deliver it to Orthodox
6 Jewish homes. I don't believe that's correct.

7 But if we can move beyond that, your Honor.

8 THE COURT: Yes, I think he should.

9 MR. SCHICK: If we can move beyond that, your Honor.

10 There is no doubt that they're a publication that's
11 entitled to whatever First Amendment privileges exist.
12 Plaintiffs first took the position that because it's an online
13 publication -- I'm sorry -- that because it's a publication
14 that is supported by advertisements and not subscriptions, it's
15 not entitled to any such protections. We went back and forth
16 with them on that. They sort of withdrew that argument, and
17 now said because it's, you know, primarily advertisements. I
18 don't think -- we don't think any of those things matter.

19 With respect to the two issues, two outstanding
20 issues, that they're seeking to compel, starting with the last
21 one with respect to rejected ads, we asked them, quite
22 specifically, "Do you have any information that would help us
23 to search for this?" In other words, information could be
24 placed by or on behalf of a specific candidate or organization
25 or with respect to a specific school board election. We said,

18c3natMS

1 "Do you have any such information that would allow us to go
2 back and say, 'Okay. There's an allegation that in the 2013
3 election or that this particular candidate or this particular
4 organization put in ads or sought to put in ads'?" And they
5 said that's not their job, and so they came back with nothing
6 on that.

7 And again, with respect to the ads themselves, I know
8 that plaintiffs today lean quite heavily on Mr. Weber. We were
9 not provided, of course, with the entire transcript of
10 Mr. Weber, but plaintiffs did append literally two pages as
11 Exhibit J of their letter. And what I see there is a question
12 on Page 161, which is one of the pages they provided, a
13 question by a Ms. Elsnor that says on Line 9, "Mr. Weber, today
14 we have gone through approximately 10 advertisements. And you
15 testified that you weren't responsible for any of them.
16 Correct?" and his answer appears on Line 13, and it says, "I
17 don't know. I wasn't responsible for any of them?" Question
18 mark. "I don't remember." Period. "There was nothing that I
19 have done there?" Question mark. "the ones that you showed
20 today" -- comma -- "yes, that's correct. I didn't do any of
21 them."

22 Now, I don't think that that snippet of testimony,
23 which in one paragraph of an answer goes back and forth between
24 what he remembers or doesn't remember with respect to any
25 particular ad and whether those ads were Community Connections

18c3natMS

1 ads, when Mr. Mangas represented today that Mr. Weber
2 testified, again in the transcript that they didn't provide me,
3 but Mr. Mangas -- but Mr. Weber testified that he did use, and
4 his organization, Southeast Ramapo Taxpayers' Association, did
5 use -- did place ads in Community Connections.

6 And going beyond that, your Honor, this does raise the
7 issue, we're not involved in this case. We're Docket Number
8 230--something, so there's a lot that's transpired before us,
9 and there's a lot that will transpire after us. So these are
10 not our issues.

11 But it does seem that the idea of an advertisement
12 that's placed the week of the election by a candidate who's
13 decided to run or not to run, who's on the ballot already in
14 which there's an advertisement that says, "Vote for this
15 candidate" or "not vote for this candidate," whatever the
16 advertisement might say, and you know, it represents that it's
17 sponsored by a particular organization, if it's so represented
18 or not, that's all the information that's necessary for this
19 case. It's hard to see how it involves slating, when it only
20 involves candidates who have already been chosen.

21 The ads say what they say. Whether or not -- and I
22 have no idea what's beyond the ads. We have not gone to look.
23 But whether or not a third party, whoever that may be, helped
24 pay for the cost of the ad says nothing to any message that a
25 voter received, says nothing to anything of any super secret

1 organization here. A voter getting a message gets the message
2 in the ad that we have been produced -- that we have already
3 produced. There is nothing that's communicated to a voter by a
4 credit card number that was offered after the election to pay
5 for the ad that was placed the day before the election.

6 So it really goes to none of the issues involved in
7 slating or anything else. It is protected. Community
8 connections is a publication. They are trying to go into our
9 confidential files which will result a chilling effect
10 ultimately with respect to the communities, whoever it is,
11 interaction with this publication.

12 THE COURT: Okay. Let me just say something,
13 Mr. Schick.

14 I read the questions that were posed to Mr. Weber.
15 the question starts at 9 and the answer starts at 13, and the
16 following question at 18 and the answer that starts at 22, as
17 Mr. Weber saying that the ones that he was showed today he does
18 not know who's responsible for putting -- that he did not do
19 any of them, and that although they said they were sponsored by
20 him or his organization, they weren't. So I think he's pretty
21 clear about what he's saying, that there are some of the ads
22 that he was shown that were not sponsored by him.

23 Now, we do have Mr. Mangas saying that not all those
24 ads were in Community Connections, but some were.

25 MR. SCHICK: Well, if I could say, your Honor, if some

18c3natMS

1 were, let them -- let them produce to us --

2 THE COURT: Well, they have. They've got -- they have
3 28 ads that they have from you. And they want to know -- so
4 you're saying --

5 MR. SCHICK: Let them ask Mr. Weber.

6 THE COURT: -- if they ask for only Mr. Weber's ad
7 information, you would give that to them?

8 MR. SCHICK: I'm saying, your Honor, if they said,
9 "Look. We showed these three ads to Mr. Weber." They don't
10 tell us how many of the ads. We had produced -- I'm not sure
11 what date this deposition was. Somebody can probably enlighten
12 us on that. It does say the 15th of November. I think we had
13 produced our ads by then. So they have all of our ads. If
14 they didn't show him all of the ads, that's on them. They had
15 all of the, all 28 ads. They had Mr. Weber I don't know for
16 how many hours. I guess I could see what time it started.

17 THE COURT: But how burdensome is it to give them this
18 information?

19 MR. SCHICK: It's quite burdensome. They have to go
20 back to 2010 to try to find through records. So it's
21 burdensome just as a straight-up matters of figuring out what
22 payment was associated with what ad going back more than eight
23 years. This goes back to, I think, May 2010. So just straight
24 up on us, it's burdensome.

25 THE COURT: So tell me about the rejection. How is it

18c3natMS

1 burdensome to ask whoever might have knowledge of it what --

2 "Had you rejected any ads?"

3 MR. SCHICK: Your Honor, it's very hard to come with a
4 definitive response to, you know, sort of a hypothetical
5 negative. You know, do I know if they're going to say --
6 because my concern here, given the "scorched earth" nature of
7 this, is, they're playing a game with us here. Because I've
8 asked them, if they have somebody or some time frame or some
9 election or some candidate or some entity that tried to place
10 an ad. And they said, "Not telling you."

11 And then I say, so I go back and I say, "Does anybody
12 remember, you know, rejecting an ad?" Now, I don't know what
13 "rejecting an ad" means. Right? But let's say they're going
14 to come up with somebody who's going to say, "Oh, Ms. So-and-so
15 says she called one day, and she said, 'Will you take my ad,
16 you know, that says "Don't vote for Jews"? or something. And
17 they hung up, or they didn't follow up.'" I don't know. So
18 without -- it's easy for me to ask that simple question, your
19 Honor. But, of course, they don't want the question. They
20 then want a legal representation that for a period of almost a
21 decade, nobody who worked there ever interacted with somebody
22 and rejected an ad for whatever reason. Maybe the person said
23 they couldn't pay. Maybe the person said they wanted to say
24 nasty things. I don't know.

25 So if they would give me something to work with, it

18c3natMS

1 would be easier. But my fear is, given the way this case has
2 been litigated, that this is the beginning. While they
3 represent as the end, "All we want is a representation from
4 Mr. Schick that there's no such rejection," what they really
5 want is us to say that, and then litigate further.

6 THE COURT: Okay. Thank you, Mr. Schick.

7 Mr. Butler or Mr. Levine, do you want to be heard?

8 MR. BUTLER: Just very briefly, your Honor.

9 In our letter, we lay out --

10 David Butler for the District.

11 Your Honor, in our letter, we lay out the legal
12 argument. And the reason why we're even entering into this
13 particular debate, the distinction that the plaintiffs ignore
14 between minority groups and minority-preferred candidates, as
15 set out in the case law, is just important for purposes of this
16 entire case. And we lay that out in our papers. I'm not going
17 to expand upon that now. You've read it. You understand that.

18 The other issue that I did want to talk about, though,
19 is one that really hasn't been addressed by either the
20 plaintiffs and, therefore, not by Mr. Schick, and that's the
21 issue of racial appeal. It is alleged in plaintiffs' papers
22 with respect to ads that appear in Community Connections.

23 They try to bootstrap an argument that somehow because
24 certain ads allegedly make certain racial appeals, that is the
25 basis upon which they say it will be relevant and necessary and

18c3natMS

1 appropriate for them to take discovery from Community
2 Connections, because they want to look into that further, see
3 who's doing it, who's sponsoring it, who's saying it, and so on
4 and so forth. there's nothing that they have shown you,
5 nothing in any of the papers that they have appended to their
6 letter, that reflects a racial appeal.

7 We set out in our papers at Page 3 of our letter the
8 instances where "the other" is discussed, or where a particular
9 candidate is identified as being somehow wrong or improper or
10 against the Torah or against the Jewish people. And we explain
11 exactly what it is. And you know what? Plaintiffs know that.
12 They know that full well.

13 They know that, for example, the Moster family, which
14 is an Orthodox Jewish family in Ramapo, is opposed, very
15 publicly, to certain aspects of Jewish communal education.
16 That's an open issue. It's the subject of litigation in the
17 courts. It's the subject of discussion in the District.
18 Everyone knows about this. And for someone to put an ad that
19 says that the candidacy of Mrs. Moster is opposed by certain
20 aspects of the Jewish community, that has nothing to do with
21 race. Nothing at all. And for the plaintiffs to come into
22 court and say that those kinds of statements are reflective of
23 racial bias, racial appeal, and therefore in support of their
24 argument that somehow, there's a Voting Rights Act violation,
25 when members of the Orthodox Jewish community support certain

18c3natMS

1 principles on policy, on tax and other issues, with not a
2 stitch of evidence to show anything racial, it's just
3 unacceptable.

4 THE COURT: Thank you, Mr. Butler.

5 Counsel, do you want to respond?

6 Hold on one second.

7 (Pause)

8 THE COURT: Do you want to respond?

9 MR. MANGAS: Thank you, your Honor.

10 Russell Mangas on behalf of the plaintiffs.

11 Your Honor, I'll respond briefly to a couple of points
12 Mr. Butler made, and then a couple of other points that
13 Mr. Schick made.

14 Starting with the issue of minority candidates versus
15 minority-preferred candidates, it's important, your Honor, to
16 take a step back. And all of us understand that the Voting
17 Rights Act is intended to ensure that minority voters -- not
18 minority candidates, but minority voters -- have a fair
19 opportunity to vote for and elect representatives of their
20 choice. Clearly, if the white community is able to identify
21 safe candidates that happen to be black or Latino and put them
22 up and deny minority voters, as opposed to candidates, the
23 opportunity to vote for someone else that they prefer, that's a
24 violation of the Voting Rights Act. That's the issue that
25 permeates this entire case. That's the issue that is a focus

18c3natMS

1 of plaintiffs.

2 With respect to racial appeals in advertisements;
3 again, I'm going to take a step back. And today, we spent most
4 of our time -- and I think the -- it's not the only basis for
5 the relevance of discovery. The main basis, which we've talked
6 about extensively, is the issue of slating. But in terms of
7 racial appeals, I'll point out two -- and then there's case
8 law -- we didn't have a reply on this, but there's case law
9 that says setting up an "us versus them" or a "that candidate
10 is not one of us," those are racial appeals -- those can be
11 racial appeals.

12 There are two in particular -- and I apologize,
13 because I don't have pen cites in front of me, but there's an
14 advertisement placed in Community Connections relevant to this
15 case that says, quote, "We must all come out and vote for our
16 community's candidates." Full stop. There's another that
17 says, "Do you know that as soon as the" -- quote -- "'preserve
18 Ramapo' candidates are elected" -- and those are referring to
19 minority-supported candidates -- "'preserve Ramapo' will try to
20 obtain all of your (unintelligible) information." Question
21 mark. Question mark. Question mark. And a graphic of a white
22 man watching his home being demolished.

23 But the important thing to keep in mind, your Honor,
24 is, we don't have to decide today whether that's a racial
25 appeal or whether that's admissible. The issue today is

18c3natMS

1 whether it's likely to lead to admissible evidence, and we've
2 certainly met the discovery standard.

3 Turning from those issues --

4 THE COURT: I'm struggling with understanding the
5 relevance of the rejected ones.

6 MR. MANGAS: The relevance of the rejected ones goes
7 to knowing whether a slating organization exists, but how it
8 works and who's involved. And if you have a community circular
9 that reaches a large proportion of the white electorate, an
10 electorate which we can go back, you know, at least over the
11 last five years, and say has been sufficient to elect a
12 candidate.

13 THE COURT: But a community circular, a newspaper,
14 they're allowed to, you know -- they don't have to put every ad
15 that comes before them. They don't have to accept every ad
16 that comes before them. So how is the ones rejected -- well, I
17 know it supports your argument that it's a -- you know, it's
18 only going to do the, you know, religious ads from -- you know,
19 that are going to target the candidates that are going to
20 support the community. But if this circular rejects some of
21 them, so let's say they did. You know, I still am struggling
22 with: What does that really show you? Why can't they do that?

23 MR. MANGAS: Well, your Honor, just to be clear, our
24 argument is not that they can't do that, or that they're
25 legally --

1 THE COURT: Okay. So if they do do that, why is that
2 a problem?

3 MR. MANGAS: Because that's evidence of not only is
4 there a slating organization, but this community circular is a
5 part of it. So if you have a group of --

6 THE COURT: But aren't you going to be able to get
7 that more through depositions of people in the organization?
8 You know, that's where you're going to find this information
9 out, you know. Do you have evidence that they've rejected
10 anything?

11 MR. MANGAS: Your Honor, I'm not aware of any evidence
12 that they've rejected an advertisement.

13 And just to correct the record, I don't believe that
14 my colleague, Ms. Elsner, told Mr. Schick that she's not
15 telling him of any. I believe what she told him was that "We
16 don't have evidence of rejected advertisements to provide you
17 with."

18 The relevance of it, your Honor, is, if there is --
19 and we know for a fact that -- we want to call it a "slating
20 mechanism" or just -- whatever you want to call it, it's been
21 highly effective in mobilizing the vote for white-preferred
22 candidates. I mean, across the board, the slate of
23 white-preferred candidates every year, each one of those people
24 gets almost exactly the same number of votes, with very little
25 variation.

1 So there is some mechanism in the community that's
2 enabling that and facilitating that. It's a very abnormal
3 thing to happen in an election. And it happens here in East
4 Ramapo every single year.

5 And so, your Honor, if there are a group of members of
6 the community who are responsible for vetting and selecting
7 acceptable candidates, and there is a circular who -- we have
8 testimony from Mr. Weber who believes is a very effective way
9 of mobilizing the vote and telling that community, whether you
10 want to call it the "Orthodox community" or the "white
11 community," they're all white, they're almost all Orthodox,
12 telling them, "Here's the candidates that you should go vote
13 for," and refusing to provide information or advertisements for
14 the minority-preferred candidates, it's highly probative of a
15 slating organization and its effectiveness.

16 THE COURT: So how do you address Mr. Schick's concern
17 that, you know, it's overburdensome to find the rejected ones,
18 and he's concerned if -- you know, that you know, he's going to
19 ask someone, and they're going to say, "We haven't rejected
20 any," and then you're come up, you know, in the course of this
21 case, finding someone, who said, "Oh, yes. I called, and they
22 said they wouldn't take my advertisement," and you know, then
23 they're like, "Ah-ha. You withheld information," which is, I
24 think, a legitimate concern Mr. Schick has. So how do you
25 address that issue?

18c3natMS

1 MR. MANGAS: So to the end, it's a burden portion of
2 that argument. There's only one school board election a year.
3 We're not asking them to determine whether they've ever
4 rejected an advertisement --

5 THE COURT: Yes, but I'm looking at a flyer that has a
6 tremendous amount of advertisements in it that -- .

7 How often is this produced?

8 MR. SCHICK: Weekly, your Honor.

9 MR. MANGAS: I believe it's every weekly.

10 THE COURT: Every week. That means the records that
11 they have ever things that, you know, might come in or might
12 not come in for this is probably large. And I'm hearing from
13 an officer of the Court that -- and you heard during the
14 meet-and-confer that the records that they have, the way they
15 can do it, they don't have the ability to do it easily, that it
16 is too burdensome for them.

17 So I appreciate the fact that you have narrowed down
18 your request to try to make it less burdensome, but Mr. Schick
19 has a concern still, because he's worried about talking to
20 someone who may say to him, "No," and then there may have been
21 someone else who answered the phone and said something
22 different.

23 MR. MANGAS: Well, your Honor, with all due respect to
24 that argument, I mean, these are -- this is clearly a very
25 hot -- the school board elections are a "hot button" issue in

18c3natMS

1 the District and in the Orthodox community. And I don't think
2 it is at all outlandish to expect that if whoever is in charge
3 for placing the advertisements at Community Connections got a
4 call from a candidate who is not one of the slate, who is
5 outside of the Orthodox community, and said, "Hey, I'd like to
6 place an advertisement for my own campaign" or "against the
7 campaign of the candidate you're advertising for," that
8 someone -- that would be burdensome to them. I believe that
9 would be a fairly easy --

10 THE COURT: Do you know if there is such a person
11 who's responsible for that?

12 MR. MANGAS: We don't. We haven't been provided that
13 information.

14 THE COURT: Mr. Schick, how does the organization --
15 Mr. Levine, if you could put the microphone in front
16 of Mr. Schick.

17 No, you can stay there.

18 MR. SCHICK: I'm sorry, your Honor.

19 I don't think there's any such single person.

20 And beyond that, Mr. Mangas in three moments said two
21 entirely contradictory things. On the one hand, he's
22 essentially trying to make Community Connections at least a
23 part of the slating organization. That's what he said. On the
24 other hand, he's saying, people outside the slate are trying to
25 work with it. We can't be both. We're not either, candidly.

18c3natMS

1 We're not either. But everything I heard from Mr. Mangas gets
2 me more concerned, because that's what he said, we are part of
3 the slating process, you know. And there's no basis for that.

4 And just to go one step beyond that, your Honor, each
5 of the ads that we produced, each of the ads, 28 ads, I
6 believe, was run the week of the school board election in May,
7 which means that the candidates had all been -- decided to run,
8 got themselves on the ballot. The idea that an ad that
9 Community Connections ran in the several days leading up to the
10 election when the candidates had been chosen, that that somehow
11 deprived any candidate of the ability to run for office cannot
12 be true. They had all decided whether to run, got their names
13 on the ballot or not, and then we decided -- you know, someone
14 ran an ad, either opposing -- somebody ran an ad in favor of
15 several candidates. There's no way that that Community
16 Connections ad deprived anybody of any right.

17 And beyond that, more importantly in this case, since
18 we produced all the ads, there's no way that if there was a
19 third-party sponsor of the ad that was run in third-party
20 Community Connections newspaper, that that somehow would have
21 any impact on the slating process.

22 THE COURT: You want to respond to that, Mr. Mangas?

23 MR. MANGAS: Yes, your Honor.

24 I think that's actually very helpful information,
25 which is that the ads for the school board run during one week

18c3natMS

1 in May prior to the elections. So it's not a burdensome task
2 to say, you know, produce advertisements since 2010, go back
3 for the week before the school board elections for each of
4 those years that there's a school board election, inquire as to
5 whether there were any political advertisements for school
6 board that were rejected. The notion that --

7 THE COURT: I'm concerned. I have the same concern
8 that Mr. Schick has. You know, we're asking now for a memory
9 that goes back ten years, where if they don't have records of
10 rejection, if they don't keep the rejection records, I think
11 the memory is not reliable.

12 MR. MANGAS: Your Honor --

13 THE COURT: They're concerned that they may say "No,"
14 and then find out that you found someone who called and they
15 said "Yes," that they did tell them not to send it in, you
16 know, that there was a rejection.

17 MR. MANGAS: So two things on that point, your Honor.

18 I mean, first, the notion that we've got someone who
19 called up and as part of the litigation strategy tried to place
20 some filthy ad or --

21 THE COURT: No one's accusing you --

22 MR. MANGAS: I can represent --

23 THE COURT: I didn't say that. Mr. Schick didn't say
24 that. They're saying that you may have -- you have not come
25 across a fact witness yet that has said they have been

18c3natMS

1 rejected. But they're concerned, what if you bump into
2 someone -- you take a deposition of someone who says, "My ad
3 was rejected"?

4 MR. MANGAS: Well, I can --

5 THE COURT: And they don't have any recollection of
6 that, and it's a "he said, she said."

7 Now, they aren't saying you're creating that
8 information, but they're concerned with the reliability of
9 someone's memory.

10 MR. MANGAS: So, your Honor, we would be satisfied if
11 instead of -- if they're not comfortable relying on the
12 institutional memory of the people that work there, if they
13 want to go back -- and we're willing to make it very narrow --
14 to a week or, say, two weeks before the school board
15 election --

16 THE COURT: How many years are you willing to go back?
17 Ten is too many.

18 MR. MANGAS: Why don't we say eight.

19 THE COURT: For the rejections.

20 MR. MANGAS: I would say eight for the advertisements
21 they've produced.

22 I mean, if there's a year they haven't produced an
23 advertisement, we could agree they don't need to do it for that
24 year. But for the 28 they produced for those years --

25 THE COURT: We're talking about rejections. How

18c3natMS

1 far -- I want to narrow the rejections. I want to give you a
2 sampling. Because I think it is burdensome. I don't know what
3 kind of records they keep. It doesn't sound like, you know,
4 they have these records easily accessible. Or otherwise,
5 Mr. Schick would have said that you could get them. On the
6 rejections alone -- that's all I'm focusing on right now -- I
7 want to do a narrow sampling of whether in that period they
8 rejected.

9 MR. MANGAS: How about we go back to the five most
10 recent elections. So it would be '13, '15, '16, '17, and '18.
11 And the two weeks leading up to the election, search the
12 documents and produce anything relevant to whether they've
13 rejected an advertisement.

14 THE COURT: So what years do you want to go back?

15 MR. MANGAS: '13, '15, '16, '17, and '18.

16 THE COURT: And why did you skip '14?

17 MR. MANGAS: There wasn't a contested election in '14.

18 THE COURT: Okay.

19 MR. MANGAS: And, your Honor, just to correct the
20 record, Mr. Schick made an argument that why we had their
21 advertisements before we deposed Mr. Weber, we could have put
22 those advertisements in front of him and we chose not to.
23 That's incorrect. In fact, we deposed Mr. Weber on the morning
24 of November 15th. Community Connections did not produce
25 advertisements until later that evening, after the deposition

18c3natMS

1 was closed. Mr. Weber was gone.

2 MR. SCHICK: I'll just say two points on that, your
3 Honor.

4 The first is, they asked us to produce the documents
5 by the 15th, which is when we produced it.

6 The more important point --

7 So if they needed it that morning, they should have
8 told us, your Honor, because we weren't playing that kind of
9 game here. They asked us for the 15th. All the correspondence
10 shows that. We produced it when they asked us.

11 More importantly, your Honor, what they're now saying
12 is, turns out they had Community Connections advertisements for
13 the school board all while they're litigating this, because
14 they had, they say, I don't know how many, they haven't said,
15 to put before Mr. Weber.

16 So again, it goes --

17 THE COURT: Well, I'm sure if they spent the time
18 looking through the Community Connections book during that,
19 they might have been able to get them on their own. This is
20 not private. But we don't need to address that, because I'm
21 not getting involved in that. You know, I'm not -- I see no
22 nefarious motives on malfeasance on anybody's side here. I
23 think everybody is just zealously representing their client.

24 Here's what we're going to do. I do believe, although
25 the -- I don't -- I don't know whether any of this evidence

18c3natMS

1 will be admissible in the long run. I do believe there's
2 enough relevance that I can deal with some of the
3 burdensomeness on the 28 ads that have been produced. I'm
4 going to direct that Community Connections provide the
5 plaintiffs -- and, of course, the District, also -- with
6 information on who paid for and placed that ad.

7 MR. SCHICK: Your Honor, if I can ask, limited to paid
8 for? To go beyond -- again, I have no idea. To go into
9 correspondence, again, of who might have placed means -- I
10 think if you look at their most recent letter, they limit it to
11 who paid for the ad.

12 THE COURT: Yes, who paid for the ad.

13 MR. SCHICK: Okay.

14 THE COURT: And then on the rejections, if there's any
15 rejections, we're going to narrow that. We're not going to go
16 back to '13. We're going to '15 through '18, so '15, '16, '17,
17 and '18. If there are any ads rejected for that week prior to
18 the election, when you typically -- you know I'm going to week
19 to two weeks, those ads you typically put in relating to the
20 school board, if there are any ads rejected. And then whatever
21 information you can provide for leading to that -- I'm not sure
22 what you have, but if you have information that shows that
23 something was rejected, some correspondence or anything like
24 that, I'm going to ask you to produce that. But if it's simply
25 a yes-or-no answer, as long as it's given by someone who has

18c3natMS

1 knowledge and knows and can answer that question. Okay?

2 MR. MANGAS: Thank you, your Honor.

3 MR. SCHICK: Your Honor, we'll look for any ads that
4 were sent in that might have rejected. And I'll certainly ask
5 my client to look for them. I don't know when that -- you
6 know, given their production schedule -- in fact, for the time
7 that I'm going to the West Coast, but I will ask them to look
8 for any ads that were submitted that were ultimately not run.
9 And then I will get back to counsel for both parties.

10 THE COURT: What kind of time do you need?

11 MR. SCHICK: I assume two weeks, just given my own --

12 THE COURT: Yes. No, that's I think reasonable.

13 Today is the 3rd. To December 7th -- 17th.

14 MR. SCHICK: If you make it the 18th, just get it in
15 on the schedule.

16 THE COURT: Yes. December 18th.

17 Thank you, Mr. Schick.

18 MR. SCHICK: Thank you, your Honor.

19 (Pause)

20 THE COURT: Okay. The next issue is plaintiffs'
21 motion to quash subpoenas to Steve White and Catalist.

22 Is there anyone here on behalf of Catalist?

23 MR. MANGAS: I don't believe so.

24 THE COURT: And I don't believe I received any
25 separate objections on behalf of Catalist, just the District's

18c3natMS

1 response.

2 Let's deal with Catalist first, because Catalist is
3 actually, I think, pretty easy.

4 The Catalist subpoena had a return to D.C. I'm Just
5 going to ask the plaintiffs to address one thing. Why do I
6 have jurisdiction?

7 MR. MANGAS: Your Honor, Russell Mangas on behalf of
8 the plaintiffs.

9 Your Honor has jurisdiction to control discovery in
10 this case. I think, in the interests of full disclosure, a
11 motion to quash was the wrong way to style the Catalist motion
12 initially. We have since styled that as a motion for a
13 protective order. And there is case law -- and I can cite it
14 for you -- that says your Honor has the ability to -- in a
15 protective order, prohibiting discovery via subpoena in other
16 districts, and particularly in cases where it's important that
17 there be a consistent rule. And the case I'm referring to is
18 another one of the Chevron cases, and it was privilege in that
19 instance, too. And the Court issued an order prohibiting the
20 defendants from getting evidence via subpoena in other
21 jurisdictions.

22 THE COURT: In my experience, I don't have
23 jurisdiction.

24 MR. MANGAS: I would ask your Honor, to the extent
25 you're inclined to (unintelligible) it today that we get an

18c3natMS

1 opportunity to brief that issue, because it would have been an
2 additional reply to some of their arguments.

3 THE COURT: Mr. Butler or Mr. Levine?

4 MR. LEVINE: This is Randall Levine for the District.

5 I agree with the Court that the Court does not have
6 jurisdiction to quash a subpoena issued from the District of
7 Columbia, where compliance is required in the District of
8 Columbia.

9 However, we don't want to undertake the additional
10 burden of opening a new matter in the District of Columbia any
11 more than the plaintiffs do. There may be a way to cut to the
12 chase, which is that the plaintiffs have admitted in their
13 papers that they have the documents that we are seeking. They
14 are simply withholding them on the basis of a privilege or
15 "work product" protection, that they have not explained. And
16 they also have not served us a privilege log setting out
17 whatever documents they are that they say are privileged and
18 explaining the basis for withholding them.

19 So one way, perhaps, to avoid dealing with the
20 out-of-circuit subpoena would be for the Court to compel the
21 plaintiffs to produce the documents that they're withholding
22 or, at the very least, to compel them to produce a privilege
23 log so those documents can be reviewed in camera by the Court
24 to determine whether there is any sound basis to withhold them.

25 And Catalist can stay in Washington, D.C. And if we

18c3natMS

1 need to enforce the subpoena against them at some point later,
2 maybe we can. But if we can get the documents directly from
3 the plaintiffs, that seems to be the faster way to do it.

4 THE COURT: Okay. Mr. Mangas, I want to hear from you
5 on it.

6 Because we have to deal with Mr. White, I think this
7 is what I'm going to do. I am going to deny plaintiffs' motion
8 to quash, without prejudice, and -- or here's what I'm going to
9 do. I'm going to grant your request to withdraw this motion,
10 and I am going to allow you to move forward -- because I do not
11 have jurisdiction. And I work very well with other magistrate
12 judges in other jurisdictions on these types of issues, where
13 it goes before them and we work together to get things quickly
14 done and back to where it belongs. But in my experience, I do
15 not have jurisdiction over a motion to quash.

16 But since it sounds like you might have these records,
17 and it's really a privilege issue, I'm going to allow you to
18 make a motion for a protective order. And I do believe I'm
19 probably going to have to look at the documents, too.

20 So I'm going to give you a briefing schedule on this,
21 because I want to also -- one of the things that happens when
22 I'm looking to evaluate whether something is -- whether someone
23 is working in a capacity as a consultant or an agent or an
24 expert, is the relationship, because that's really what -- it's
25 very fact-specific, and letter briefs usually can't give me

18c3natMS

1 enough factual information to make the determination. Because
2 the first thing have I to do is determine what the relationship
3 is, and I have to determine what would be privileged in that
4 relationship.

5 So I'm going to give you a briefing schedule on the
6 protective order.

7 When do you think -- how much time do you --

8 MR. MANGAS: Next Monday?

9 THE COURT: That is --

10 MR. MANGAS: And I have my phone on me. I will tell
11 you.

12 THE COURT: The 10th.

13 MR. MANGAS: The 10th?

14 THE COURT: December 10th. Will that be enough time
15 for you to make sure that I have all the information I need,
16 you know, the motion and whatever affidavits you need in
17 support of that? I don't want to hold this one up, because I
18 also know this is going to go and have some effect on expert
19 depositions which are coming up, I think, not this month, but
20 next month. So we have a little bit of time, but I want to get
21 it briefed before maybe -- because I have a huge docket that
22 I'm dealing with.

23 MR. MANGAS: Well, given that your Honor mentioned
24 affidavits at the end, that's a good point. Could it be the
25 following week, 12/17?

18c3natMS

1 THE COURT: I'm fine with that.

2 Mr. Butler?

3 MR. BUTLER: Can we respond by January 3?

4 THE COURT: Yes.

5 MR. MANGAS: Your Honor, will that cover the Steve
6 White?

7 THE COURT: No.

8 MR. MANGAS: Okay.

9 THE COURT: No, we're going to deal with that in a
10 second. It may, depending on how I rule on Steve White. But I
11 want to deal with Steve White separately, and I want
12 Ms. Barbieri to have an opportunity to talk. This is right now
13 just for Catalist.

14 MR. MANGAS: Okay.

15 MR. BUTLER: Your Honor?

16 THE COURT: Yes.

17 MR. BUTLER: I apologize for interjecting.

18 THE COURT: No.

19 MR. BUTLER: This is David Butler.

20 I just want to understand. The brief that's coming in
21 from the plaintiffs, that's going to be their brief, their
22 affidavit and the privilege log?

23 THE COURT: What I'm going to ask -- yes, because I
24 can't decide privilege without a privilege log. Because they
25 also, you know, need to understand what is being withheld.

18c3natMS

1 What's your position on the privilege log?

2 MR. MANGAS: Well, your Honor, I think that's quite a
3 burden to impose on a party for -- strictly for communications
4 with a consulting expert that postdate the filing of the
5 litigation. I can't tell you off the top of my head today
6 exactly what that volume is.

7 THE COURT: So this is what I'm going to do. I'm not
8 going to require a privilege log in this case, because it's
9 consulting expert. But if I should find that I don't believe
10 it's consulting expert --

11 And I do want you to produce the documents to me. How
12 many are there?

13 MR. MANGAS: You're asking me how many? Your Honor, I
14 don't know.

15 THE COURT: Give me inches. Less than a box, please.

16 MR. MANGAS: So a stack like that.

17 THE COURT: Okay. I'm going to ask that you produce
18 that ex parte to me. Now, you're going to have to be very
19 thorough on the grounds in which you are withholding documents
20 so that the defendants can have a meaningful opportunity to
21 respond to that. If I find, one, that he's not a consulting
22 expert around, or two, that there are documents in there that I
23 need a more specific type of analysis from the defendants, I
24 will then ask for a privilege log. But on the first step, I'm
25 going to say no, given the fact that he was retained after, and

18c3natMS

1 sounds like he may be a consulting expert.

2 But you need to give me enough of the facts for both
3 sides so that Mr. Butler and Mr. Levine really understand, you
4 know, the grounds. Because these are very fact-specific
5 analyses that have to be done to determine whether documents
6 should remain attorney work product or not.

7 MR. MANGAS: Understood, your Honor.

8 And I want to be very clear for the record. While
9 Catalist is a consulting expert that was engaged by plaintiffs
10 to help them understand voter data and the racially polarized
11 voting analysis, they have provided one file, a 2017 voter file
12 with race data appended, to plaintiffs' experts in this case.
13 That file was disclosed to defendants.

14 THE COURT: No, I understand that.

15 MR. MANGAS: And that's the only file that --

16 THE COURT: That you believe is fact-specific, and,
17 therefore they rest --

18 MR. MANGAS: And that the testifying experts
19 considered and relied on.

20 THE COURT: Yes.

21 MR. MANGAS: So I actually want to be very clear. I
22 don't want to misrepresent to your Honor --

23 THE COURT: No.

24 MR. MANGAS: -- that there's not any information
25 they've provided that's discoverable as a consulting expert.

1 THE COURT: No, no. You have -- you produced what you
2 believe is the factual basis, the factual data in which they
3 produced to the expert for the expert to rely on. But there
4 are other things you have withheld that you believe are
5 attorney work product. And that's what I wanted to focus this
6 motion on.

7 So Catalist -- this will be on Catalist only.
8 Plaintiffs' motion for protective order is due 12/17.
9 Defendant, the District's response is January 3rd. The reply
10 is January 10th by the plaintiffs. And I do want the ex parte
11 documents to come in on 12/17. Okay?

12 MR. MANGAS: Thank you, your Honor.

13 THE COURT: Okay. So now let's deal with Steve White.

14 So I did get them to stop doing their work for a
15 little over an hour, so I appreciate that. But I don't think
16 we're going to get any longer. But I think if it becomes truly
17 problematic, we'll call again.

18 So tell me, why are you withholding Steve White's
19 documents?

20 MR. MANGAS: So just to be very clear, your Honor, we
21 are not taking the position that the District is prohibited
22 from getting discovery from Mr. White on who he's talked to,
23 what they said, what he said, events that have occurred in the
24 District.

25 Our objection is solely based on the communications

18c3natMS

1 between Latham and the New York Civil Liberties Union and
2 Mr. White. And also, I believe there may be -- I don't believe
3 any documents exist, but to the extent there are documents
4 within the control group of the plaintiffs and their attorneys
5 and Mr. White. As your Honor is aware, the community and the
6 District have some fairly unique attributes, demographics,
7 issues that underlie these Voting Rights Act issues and the
8 school board elections, and might include to a certain
9 extent -- and Latham certainly is coming into that -- community
10 in that district uninformed about those dynamics and who the
11 players are and how they work and what the history is.

12 And so the plaintiffs, prior to filing the lawsuit,
13 engaged Mr. White as a consulting expert, to help them work
14 through some of that stuff and to understand the dynamics in
15 the District and who the different players were, and how these
16 elections operate and who participated in the slating
17 organizations, what kind of forms existed in the District, and
18 to get an understanding --

19 THE COURT: I didn't see any letter attached that
20 retained Mr. White or showed the relationship that you have
21 with Mr. White. How come you didn't attach that?

22 MR. MANGAS: We have a consulting agreement, our copy
23 consulting agreement, that was given -- to provide to your
24 Honor.

25 THE COURT: Why didn't you include that?

18c3natMS

1 MR. MANGAS: Because we didn't think we would have to
2 produce it.

3 THE COURT: Why?

4 MR. MANGAS: And we don't think -- see how it's
5 relevant.

6 THE COURT: See. Honestly, why is it not relevant?
7 Why wouldn't it be relevant, when I have to determine what kind
8 of relationship that it's had, whether it's truly a consulting
9 relationship with someone who has clearly been -- was a
10 plaintiff in another case, is clearly, you know, akin to a fact
11 witness, who -- you know, I don't see -- what is the difference
12 between going out and chatting with any other person in the
13 community to find out what they know and doing your due
14 diligence and the investigation, pre-investigation, on this?
15 You know, Mr. White -- I don't have a CV on him. I don't have
16 a résumé on him. I don't have --

17 Did you pay him? I don't have any invoices? Did you
18 pay Mr. White?

19 MR. MANGAS: I'm not positive about that.

20 Do you know?

21 No, he's not paid.

22 THE COURT: So I have to tell you that there's some
23 concern with this consulting agreement put into place in order
24 to protect the communications you have with him when he's not
25 really an expert. What is he interpreting that your plaintiffs

18c3natMS

1 can't tell you themselves? Like what is he giving you that
2 makes him truly an expert? Has he ever been an expert,
3 declared an expert?

4 MR. MANGAS: Not to my knowledge, your Honor. But to
5 be clear, he's not a testifying expert. He is a consulting
6 expert --

7 THE COURT: Doesn't matter.

8 MR. MANGAS: -- in this case. But no, he's not a --

9 THE COURT: What makes him an expert? What makes him
10 different than just someone in the community who has knowledge?

11 MR. MANGAS: For all the reasons the defendants cite
12 in their brief. He is one of the prime activists and been
13 members involved in the school board elections.

14 THE COURT: Fact witness. Sounds a lot like a fact
15 witness.

16 MR. MANGAS: Your Honor, they're entitled to depose
17 him as a fact witness. But if they want -- what they're trying
18 to do here is just --

19 THE COURT: But how does every conversation you have
20 with him get protected? Just because you have a paper saying
21 he's going to be a consultant?

22 MR. MANGAS: Because we engaged him as a consultant to
23 help us understand and to inform our litigation strategy.

24 THE COURT: Yes. Okay. There was what -- we're
25 not -- because we have been here a long time. I have serious,

1 very serious doubts. I do not want to support law firms on
2 basically limiting the amount of discovery an opposing party
3 can get by simply finding someone in the community who has
4 previously been an advocate or a, you know, concerned citizen,
5 and basically saying, any conversations you have with them
6 become privileged, simply by signing a consulting agreement
7 with them.

8 But I firmly believe that this goes in the same
9 category as anything with attorney client to be work-product
10 privileges which I believe are very fact-specific. And I don't
11 believe -- this is the one area that I do not usually decide on
12 letter motions, because I don't believe the letter motions can
13 give me enough information, enough factual information. I
14 don't believe that if I denied or, you know, granted their
15 ability to -- or deny your motion to quash, that I would have a
16 sufficient record before Judge Seibel to do so.

17 So to answer Mr. Levine's question, that schedule now
18 will include -- and if we need to adjust it -- need to include
19 Mr. White, because I need to examine the relationship and the
20 agreement and the case law on whether this is truly a
21 relationship that would warrant the protections of the
22 "attorney work product" privilege as it relates to having
23 consulting experts. I certainly do not want to -- I respect
24 that privilege. I think it's an important one to have. But
25 it's important -- it's not -- it's a qualified privilege. It's

18c3natMS

1 not absolute. And it's also important not to extend it more
2 than it needs to be.

3 Mr. Levine.

4 MR. LEVINE: Yes.

5 Your Honor, there's another practical issue that I
6 just wanted to make sure was addressed, which is that there was
7 a document collection from Mr. White and from his wife,
8 Mrs. White, ongoing, though stopped in the middle, so nothing
9 was obtained. However, the plaintiffs now have sort of
10 injected themselves into the discovery process, and are
11 undertaking that collection from Mr. and Mrs. White themselves.

12 Are we going to get those documents? Are we going to
13 get a privilege log of documents that are withheld? How is
14 this supposed to work practically, and when can we expect to
15 see these documents?

16 It's especially important also, because I'll note,
17 while they have their claims of privilege and work product
18 associated with their communications with Mr. White, they have
19 none whatsoever with respect to Mrs. White. And there's no
20 reason at all why they should be inserting themselves into that
21 process.

22 I mean, we'd also like to take a look at the
23 consulting agreement, as well.

24 THE COURT: Well, I'm assuming it's going to be
25 part --

1 MR. MANGAS: We'll attach it to our brief.

2 THE COURT: -- of the papers. If it's not, they're
3 going to have a problem supporting their argument.

4 I want to let Ms. Barbieri, who has just stood up, to
5 also respond to this.

6 But if you could respond to Mr. Levine's question.
7 Because I'm sure there are records that are not protected by
8 the privilege.

9 MR. MANGAS: Sure, your Honor. And then, I'll turn
10 over to Ms. Barbieri for the bulk of that.

11 What I can say is that we were concerned when we found
12 out the District had gone in and grabbed some portion of
13 documents that may contain our privileged -- our work product
14 that we're asserting privilege over. And so we asked -- and
15 it's one thing we haven't discussed today -- that they either
16 return or destroy what they've presently collected. And we've
17 agreed to -- we've collected the ESI now from the Whites, and
18 we've agreed to process it on their behalf and turn it over to
19 Ms. Barbieri so that she can review and produce. The only
20 thing that we're asking is that we have a chance to maintain
21 our work-product privilege while that occurs.

22 My understanding is that the search terms that the
23 defendant asked for included things like the name White, and so
24 it was returning hundreds of thousands of documents. I know
25 that there's been some conversation to whittle that down, but

18c3natMS

1 I'll turn that over to Ms. Barbieri and let her discuss that.

2 THE COURT: So let me just ask Mr. Levine one quick
3 question.

4 Do you -- in the aborted discovery retention process
5 that had begun, do you have documents?

6 MR. LEVINE: No. And they know we don't. They said
7 so in their letter, that, you know, the vendors that were sent
8 to the Whites have told the Whites that there was some
9 technical problem. This hasn't worked. We're going to have to
10 come back later. And that's when they got kicked out.

11 THE COURT: So it's not an issue I have to deal with.

12 MR. MANGAS: We're willing to accept the
13 representation the note that he is referring to as a note
14 that's specific to Emilia Whites' computer. Our understanding
15 from the Whites was that there was some portion of information
16 that the vendor had managed to capture an image and then taken
17 with him. If that's not the case, then there's nothing to
18 decide here, but that was our understanding.

19 THE COURT: Mr. Levine?

20 MR. LEVINE: To use the technical term, the vendor got
21 bupkis.

22 THE COURT: All right. Okay. Ms. Barbieri, if you
23 could come up.

24 MS. BARBIERI: Good afternoon, your Honor. Nice to
25 see you.

18c3natMS

1 THE COURT: Nice to see you again, too.

2 So I know that you had been working with plaintiffs to
3 gather together the documents, and then to produce those that
4 were deemed nonprivileged.

5 MS. BARBIERI: Yes.

6 THE COURT: Is that process still ongoing?

7 MS. BARBIERI: Yes, it is, your Honor.

8 As Mr. Levine represented, we did start with the
9 District. The District was extremely generous in allowing us
10 to collect that information. We got waylaid in the process
11 because of the type of collection the District wanted to do.
12 We had a misunderstanding with that process. I believe my
13 e-mails laid out that misunderstanding fairly well, so I won't
14 belabor that point.

15 So my e-mails with Randy Levine laid out that
16 misunderstanding. And I will say, from the Whites'
17 perspective, they were extremely upset at that process, because
18 their computers were taken apart. They were put to a five-hour
19 ordeal. And now I will say, Mr. White's computer does not
20 work. And he is very concerned that that process had something
21 to do with his hard drive now not working, and does not know
22 what happened, whether the taking apart is in part responsible
23 for his hard drive not working now, or whether the Latham &
24 Watkins process is responsible for his hard drive not working
25 now. But his hard drive is not working now, and he feels

1 completely victimized by this entire ordeal, being a
2 third-party witness and not having what he considers to be
3 sufficiently probative information to be subjected to this
4 entire process. But he did want me to relay that to the Court.

5 THE COURT: Well, he must have enough probative
6 information if he was being retained by plaintiffs' counsel as
7 a consulting expert.

8 MS. BARBIERI: Yes. Some information, yes. I
9 suspect --

10 THE COURT: They deemed him valuable.

11 MS. BARBIERI: Yes. Some information, yes.

12 So the process, as Mr. Mangas has represented, is now
13 in Latham & Watkins' hands. We have -- we have the e-mails of
14 both Mr. White and Mrs. whites have been searched. That
15 process has been accomplished. And we have 99,000 documents,
16 both for Mr. and Mrs. White that have been isolated.

17 And as Mr. Mangas had represented, 55,000 documents of
18 Mr. White have come back with the term "White" as a result.
19 And so we have not with the District had an opportunity to meet
20 and confer about this issue. And I'm confident, actually, that
21 the District and I will be able to work out how we're going to
22 modify those search terms accordingly, so that we can reach an
23 agreement as to further drilling down on the search terms, so
24 that we can get a reasonable number of hits and figure out how
25 we're going to work out "White."

18c3natMS

1 THE COURT: Who's going to produce the privilege log?

2 MS. BARBIERI: What is going to happen is, Latham &
3 Watkins will review their privilege information with their
4 attorney-client privilege and work product under their name.

5 THE COURT: Has that been culled out yet?

6 MS. BARBIERI: Their name and their documents has been
7 separately searched. My name, Laura Barbieri, Advocates, has
8 also been separately searched. Although the District did not
9 ask for that term to be searched, I inputted it because of
10 Montesa. And so we did Schwartz, as well, Mr. Schwartz's name,
11 as well. And so we separately searched that name so that I
12 could more easily do a privilege log with respect to that
13 information.

14 I am also going to review Latham & Watkins'
15 information. And I hope that, together, we will agree on what
16 is privileged and what is not privileged.

17 Ultimately, it's my responsibility to produce the
18 privilege log to the District, since it's our documents that
19 are being produced.

20 So although Latham & Watkins will have the first cut
21 of those documents, I'm hoping that we don't have any
22 disagreement with respect to the ultimate production.

23 THE COURT: So what do we -- because we really
24 can't --

25 MS. BARBIERI: What we're --

1 THE COURT: I can't review a motion until I have a
2 privilege log.

3 MS. BARBIERI: Understood.

4 THE COURT: So was kind of type frame? I know you
5 need to meet and confer again with the District. What kind of
6 time frame are we looking at?

7 MS. BARBIERI: And again, this is just with the
8 e-mails. We still have the hard drives to be searched of both
9 Mrs. White and Mr. White. And we have expedited the hard drive
10 search of Mrs. White, because as Mr. Levine has said, and as we
11 had previously agreed, Mrs. White's search is going to be much
12 smaller. So we wanted to try to get Mrs. White's documents
13 produced to the District in a much expedited way.

14 In terms of time, just for the e-mails, I need to
15 consult with the Latham & Watkins, but I don't believe that
16 will be too much longer in order to expedite it with
17 meet-and-confer. So I'm anticipating maybe --

18 THE COURT: I'm sorry. I didn't mean to interrupt.
19 Go ahead. Anticipating maybe?

20 MS. BARBIERI: -- two weeks.

21 THE COURT: And what's the time frame on the hard
22 drives?

23 MS. BARBIERI: The hard drive is a terabyte hard
24 drive. And so we have identified the files that are going to
25 be searched. We did that I want to say last Friday. So once

18c3natMS

1 those searches are run, then it's going to be document review.
2 The documents are quite numerous. I'm thinking a month. And
3 then the privilege log will have to be produced after that.

4 (Pause)

5 THE COURT: Okay. So counsel, what are your thoughts
6 on timing for that motion?

7 MR. MANGAS: So my only concern, your Honor, is that I
8 know the hit counts for documents, I'll --

9 Oh, I should also say Russell Mangas on behalf of the
10 plaintiffs.

11 Your Honor, my only concern is, I know, it's an
12 enormous e-mail system. And we mentioned there are
13 approximately a hundred thousand hits. My understanding -- and
14 I can be corrected, because this process goes on -- is that
15 there are 1500 or so that hit on attorney names from either
16 Latham & Watkins or the New York Civil Liberties Union. And so
17 I just want to make clear. Is your Honor requiring us to do
18 that review and produce a privilege log of all those documents
19 along with the motion?

20 THE COURT: Yes. I mean, because we can't -- I can't
21 decide a motion and they can't, you know, oppose the motion
22 without seeing a privilege log. So what do you think timing?
23 It's less than the other. I mean, did Ms. Barbieri say they
24 were?

25 MR. MANGAS: It's less than Ms. Barbieri asked from

18c3natMS

1 you, that's correct.

2 THE COURT: 99,000 documents?

3 MS. BARBIERI: We had -- I will say that we had
4 discussed with the District in the meet-and-confer potentially
5 narrowing the time frame for the review. We originally had
6 reviewed a time frame from 2005 to 2018, and thought about
7 narrowing the time frame to 2012 to 2018, and the District
8 didn't say no, so . . .

9 THE COURT: I'm not going to get involved in --

10 MS. BARBIERI: Before we meet and confer.

11 THE COURT: Yes.

12 MS. BARBIERI: I understand.

13 THE COURT: I want you guys to continue on in the
14 meet-and-confer process. Understand that the nonprivileged
15 documents need to be produced.

16 MS. BARBIERI: Understood.

17 THE COURT: And you need to work together on --

18 MS. BARBIERI: I appreciate that.

19 THE COURT: -- pulling that stuff together. And then
20 once -- and I think your privilege log on your documents
21 relating to your prior representation of Mr. White -- you need
22 to do a privilege log, but I also think that --

23 And I look to Mr. Levine and Mr. Butler. Just nod
24 your head one way or the other.

25 -- that that, on a priority schedule, goes lower than

1 the production of the documents --

2 MS. BARBIERI: Understood.

3 THE COURT: -- and the privilege log for Latham &
4 Watkins.

5 Is that fair, counsel?

6 MR. MANGAS: Yes. We agree.

7 MS. BARBIERI: Yes.

8 THE COURT: So that needs to be done, but I don't want
9 that to hold up the production of the documents --

10 MS. BARBIERI: Understood.

11 THE COURT: -- or the production of the Latham &
12 Watkins privilege log.

13 MS. BARBIERI: Understood.

14 THE COURT: So continue on with that process.
15 Continue on this week with that process. You know, continue to
16 make as much headway as you can.

17 MS. BARBIERI: Yes, will do.

18 THE COURT: And don't produce as many -- you know,
19 especially because the ESI may require either a process where
20 you have to kind of try some different words to see if you can
21 narrow the ESI.

22 MS. BARBIERI: Absolutely. We can do that.

23 THE COURT: Okay. Great.

24 So Mr. Mangas.

25 MR. MANGAS: So I mean, a lot of this, I think, will

18c3natMS

1 depend on these negotiations on the ESI and the size that set
2 ultimately is. But (unintelligible) will take a significant
3 amount of time. We're talking about just, you know --

4 THE COURT: I'm just talking about your Latham &
5 Watkins ones. Because that's your only one -- any documents
6 from Latham & Watkins are truly the only ones that you probably
7 can claim any kind of privilege to.

8 MR. MANGAS: And my understanding, again, just
9 briefly, was informed on the initial set of doc counts, is that
10 it's well over a thousand documents to have. It's not just
11 Latham, but also the New York Civil Liberties Union.

12 THE COURT: Yes. And I assume it's time frame.
13 Because you didn't retain him until 2017. When was it? Was
14 it -- we were speaking in May. I don't know if the retention
15 was in May or later.

16 MR. MANGAS: May, we began discussing the retention.
17 We signed the formal agreement in August.

18 I believe that's correct, your Honor. I mean, I
19 haven't seen the date range of the documents, but I can't
20 imagine why there would be documents predating that.

21 THE COURT: And maybe they didn't name the NAACP.

22 MR. MANGAS: Could be with the NAACP or the New York
23 Civil Liberties Union. I'm not positive.

24 THE COURT: Yes. So that may narrow -- I'm surprised
25 to hear there's a thousand.

18c3natMS

1 (Pause)

2 MR. MANGAS: Your Honor, I mean, I would ask for three
3 weeks to get those documents to you, because I think,
4 unfortunately, that puts us right past Christmas and we have a
5 bunch of people on the case that have travel plans and holiday
6 plans. But if we could get three weeks, we will do our very
7 best to get it within three weeks.

8 THE COURT: Okay. This is what we're going to do. On
9 Mr. White's documents, I want you to get the privilege log to
10 the District by January 2nd. I'm going to request that the
11 parties meet and confer in the next week on that privilege log,
12 2nd to the 9th, to discuss, you know, if there's -- if there
13 are documents that the District believes, you know, are not
14 privileged, or they need follow up questions, I want to give
15 you guys a week after getting it to have that discussion.

16 And then, do you want to set the motion schedule now
17 for this? Because I know we're going to have to get a motion
18 for me to decide this, unless you can convince --

19 Mr. Butler, if you saw the consulting retainer
20 agreement, or Mr. Levine, would that be enough for you to
21 determine that this was a consulting expert, and you just want
22 to make sure that the documents that were being withheld were
23 truly privileged, or are you still going to want to have the
24 Court decide this issue?

25 MR. BUTLER: We don't know.

18c3natMS

1 THE COURT: Okay. This is what you're going to do.
2 You're going to produce them the consulting agreement.

3 MR. MANGAS: We can do that today.

4 THE COURT: Yes. You're going to do it this week.

5 And then you're going to have the privilege log to
6 them on January 2nd. By January 9th, you will have met and
7 conferred. By January 11th, you're going to write to me and
8 let me know if you guys need this issue to be tee'd up to the
9 Court, and you're going to put in that letter a proposed
10 briefing schedule on it. You're either going to tell me the
11 issue is moot and -- or "We need to brief this."

12 MR. MANGAS: Thank you, your Honor.

13 THE COURT: Okay?

14 (Pause)

15 THE COURT: Okay. The final issue that I have on the
16 pre-motion letters deals with the District's motion for
17 Mrs. White's -- to show cause why she failed to appear at a
18 deposition. Can we get -- can we deal with this quickly?

19 MR. BUTLER: I think so, your Honor.

20 David Butler for the District.

21 If this issue was uncertain enough for Ms. Barbieri to
22 have to call Mr. Levine to say something, and she left a
23 message, "Call me," it was important enough or uncertain enough
24 for her to have to tell us that Mrs. White was not going to be
25 showing up for a deposition the next day. Instead, nobody told

18c3natMS

1 us. We showed up. We had a court reporter. We expended time.
2 And she doesn't show up. And then afterwards, we find out,
3 "Oh, you never returned my call, so I never told you that she
4 wasn't going to show up."

5 Our request here is not scorched earth. It is very
6 modest. We ask only to be reimbursed for the cost of the court
7 reporter having shown up and being sent home.

8 THE COURT: What was the bust fee?

9 MR. BUTLER: \$178. And that's all we're asking for.

10 And, of course, we also want an order directing her to
11 show up for a deposition. But in terms of --

12 THE COURT: I don't think you're going to need that.
13 She's going to show up once the documents are produced.

14 MR. BUTLER: Okay.

15 THE COURT: Ms. Barbieri, while you're here, do you
16 want to give a response to this?

17 MS. BARBIERI: Yes, your Honor.

18 At no time did we ever agree to a deposition that was
19 before documents were to be produced. At no time. And Randy
20 Levine and David Butler knew this. Every single one of my
21 e-mails was contingent on documents being produced. And I
22 produced, I think, nine e-mails. I can go through each of
23 those e-mails where every single one of them says, "Contingent
24 upon documents being produced, we will schedule that
25 deposition." And even my e-mails say, "Tentatively, the 12th

18c3natMS

1 of November. Tentatively, the 12th of November, dependent on
2 documents being produced." And when I called Randy Levine on
3 the 9th of November, I said, "Please call me about" --

4 THE COURT: When was the deposition scheduled for?

5 MS. BARBIERI: It was scheduled for -- originally, it
6 was --

7 THE COURT: When did the bust happen?

8 MS. BARBIERI: -- scheduled for the 16th of October.
9 And we had postponed that, because we were going to produce
10 documents. And then thereafter, we had scheduled documents to
11 be produced contingent upon the deposition.

12 THE COURT: What was the bust date? What was the date
13 they showed up and paid --

14 MS. BARBIERI: Say it again.

15 THE COURT: What was the date they showed up and
16 Ms. White did not?

17 MS. BARBIERI: November 12th. That was Veterans' Day.

18 So in my e-mail --

19 Should I wait for you or --

20 THE COURT: No.

21 MS. BARBIERI: -- should I talk?

22 Okay. So in my e-mail, which is the first e-mail that
23 I have appended to my letter, the e-mail on October 13th, which
24 is my first conversation recapping our conversations together,
25 I say, "We agree that it's likely that Emilia White's

18c3natMS

1 deposition may precede Steve's, because the documents that are
2 going to be produced will be easier and faster." That's Item
3 Number 7 on my October 13th e-mail.

4 Then, on my second e-mail that I appended, I say again
5 that "The collection process has been frustrated," that we
6 again are appending that e-mail, because we need the collection
7 to go first before any depositions are going to be taken.

8 We're arguing about collection again. And collection
9 is going to precede depositions. We're arguing about
10 collection before depositions.

11 And then, in Exhibit 5 regarding depositions, "As I
12 might have mentioned, Emilia White is off on Mondays. It would
13 be a tremendous hardship for her to be deposed" --

14 THE COURT: Which -- can you? Which docket? It's
15 217-1.

16 MS. BARBIERI: Yes. I am referring to my letter on --
17 to the District that is in response to -- it's dated
18 November 14th, 2018.

19 THE COURT: That's fine. Thank you. Thank you.

20 MS. BARBIERI: And so my Exhibit 5, which is the
21 November 2nd e-mail, I'm saying regarding depositions, "As I
22 might have mentioned, she's off on Mondays, so it would be
23 extremely hardship of hers to be deposed on any other day. So
24 I propose the 12th, assuming documents can be reviewed and
25 produced in time."

18c3natMS

1 And that e-mail goes on to say, "Laura, from Randall.
2 We will get back to you once we connect with our vendor and
3 check everyone's calendars regarding the suggested depositions
4 dates." I'm sorry. That was David. "Let's tentatively
5 reserve 11/12 for Emilia, and 12/14 for Steve."

6 And then I respond, "Okay. Assuming document
7 production and all, these dates are acceptable."

8 Again, my responses are always contingent on document
9 production.

10 And then with William Craven's e-mail on November 2nd,
11 after our meet-and-confer, which we had an extensive
12 meet-and-confer on document productions, he outlines our
13 meet-and-confer. And on the date, Number 5 -- this is
14 Exhibit 6, dates for document production and depositions. We
15 agreed that "The production of documents responsive to
16 subpoenas and depositions of your clients must be completed
17 before November 5th -- 19th." That's when the Court's schedule
18 had been that all depositions had been -- had to occur before
19 the 19th. So we were operating under that deadline. So that
20 was the Court's schedule for the parties' depositions.

21 "You provided us with potential deposition dates for
22 your clients' depositions as soon as possible. And if anything
23 in these e-mails does not accurately reflect our agreement,
24 please let us know." So I wrote that.

25 Item Number 5 in my e-mail writing back, "These are

18c3natMS

1 the Court's deadlines to the parties, as you have indicated. I
2 am out of the country on November 19th. I will endeavor to
3 complete document review as quickly as humanly possible, but
4 I'm not super human. I do have other obligations. I will try
5 to adhere to the schedule you are proposing as fast as
6 possible."

7 I also had put before that, "Should I" -- I was asking
8 whether I should bring a motion to quash based on the timing of
9 everything.

10 So I had decided not to do that, but I said, "I will
11 try to get this by October -- by November 19th as best as
12 possible." And that was with respect to the deposition dates,
13 as well as the document review.

14 I had made the same point --

15 THE COURT: So this is -- this is what I'm going to do
16 on this one. I'm going to deny it. I believe that this was a
17 miscommunication. So I'm going to deny the District's motion
18 for the fee. But I am going to direct that Ms. White has to
19 appear for deposition after the production of her documents,
20 which I think was -- is your intention.

21 MS. BARBIERI: Thank you. Thank you, your Honor.

22 THE COURT: Okay. Anything further we need to deal
23 with today? Otherwise, I would like to look at a calendar and
24 schedule -- ask you when you think you need to come back.

25 (Pause)

18c3natMS

1 MR. BUTLER: Your Honor, this is David Butler.

2 In light of the fact that we have some scheduled
3 activity at the beginning of January, maybe it makes sense to
4 schedule something in the middle of January, just to see where
5 we're up to?

6 THE COURT: I was thinking after the Catalist is fully
7 briefed by January 10th. I'm looking at my calendar for
8 something. I would say --

9 Ms. Hummel, how bad is the week of the 21st for me?

10 MR. BUTLER: Can we do it the earlier week, your
11 Honor?

12 THE COURT: The problem on that earlier week on the
13 14th, is, I don't know if I have any time.

14 Ms. Hummel, looking at the 14th or 16th, do I have --
15 or the 16th, do I have --

16 (Pause)

17 THE COURT: And when you're looking at the afternoon,
18 you're looking at 2:00 p.m, or later?

19 Okay, counsel.

20 MR. BUTLER: Seems to work for everyone here, your
21 Honor.

22 THE COURT: 2:00 p.m., on the 16th?

23 (Pause)

24 THE COURT: Okay. So we will meet on January 16th.

25 I may have questions for you on the motions if I have

1 a chance to at least quickly look at it prior to that, because
2 we'll get them in on the -- post them in on the 10th. So keep
3 that in mind. Okay?

4 ALL COUNSEL: Thank you, your Honor.

5 THE COURT: Have a good day.

6 - - -
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25